



## **DEPARTMENT OF AGRICULTURE**

### **Rural Utilities Service**

#### **7 CFR Part 1738**

#### **RIN 0572-AC34**

#### **Rural Broadband Access Loans and Loan Guarantees**

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Interim rule.

**SUMMARY:** The Rural Utilities Service, an agency of the United States Department of Agriculture, hereinafter referred to as the Agency, is amending its regulation for the Rural Broadband Access Loan and Loan Guarantee Program (Broadband Loan Program) to implement the Agricultural Act of 2014 (the 2014 Farm Bill). The enactment of the 2014 Farm Bill made changes the Agency must adopt prior to accepting applications for future loans. The Agency is publishing this regulation as an interim rule, which will take effect upon publication in the Federal Register, and will allow the Agency to begin accepting applications once again. In addition, the Agency is seeking comments regarding this interim rule to guide its efforts in drafting the final rule for the Broadband Loan Program.

**DATES:** Effective date: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment date: [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Submit comments, identified by docket number RUS-15-Telecom-0001 and RIN number 0572-AC34, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Postal Mail/Commercial Delivery/Hand Delivery: Michele Brooks, Director, Program Development and Regulatory Analysis, USDA Rural Development, 1400 Independence Avenue, STOP 1522, Room 5159, Washington, D.C. 20250-1522.

RUS will post all comments received without change, including any personal information that is included with the comment, on <http://regulations.gov>. Comments will be available for inspection online at <http://www.regulations.gov> and at the address listed above between 8:00 am and 4:30 pm., Monday through Friday, except holidays. A copy of this rule is also available through the Rural Development homepage at [http://www.rurdev.usda.gov/RDU\\_FederalRegisterPubs.html](http://www.rurdev.usda.gov/RDU_FederalRegisterPubs.html). Additional information about the Agency and its programs is available on the Internet at <http://www.rurdev.usda.gov/index.html>.

**FOR FURTHER INFORMATION CONTACT:** Kenneth Kuchno, Deputy Assistant Administrator, Policy and Outreach Division, Rural Development, U.S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 1590, Room 5151-S, Washington, DC 20250-1590. Telephone number: (202) 720-9554, Facsimile: (202) 720-0810.

Persons with disabilities or who require alternative means for communication should contact the USDA Target Center at (202) 720-2600.

## **SUPPLEMENTARY INFORMATION:**

### **Executive Order 12866**

This rule has been determined to be significant and was reviewed by the Office of Management and Budget under Executive Order 12866. In accordance with Executive Order 12866, an Economic Impact Analysis was completed, outlining the costs and benefits of implementing this program in rural America. The complete analysis is available from the Agency upon request. The following is the discussion of the Economic Benefits section of the Analysis.

### **Economic Benefits of Broadband Deployment in Rural Areas:**

Bringing broadband services to rural areas does present some challenges. Because rural systems must contend with lower household density than urban systems, the cost to deploy fiber-to-the-home (FTTH) and 4G LTE systems in urban communities is considerably lower on a per household basis, making urban systems more economical to construct. Depending upon the technology deployed it can be more expensive to provide service to rural customers than to customers located in urban areas. Other associated rural issues, such as environmental challenges or providing wireless service through mountainous areas, also can add to the cost of deployment.

Areas with low population size, locations that have experienced persistent population loss and an aging population, or places where population is widely dispersed

over demanding terrain generally have difficulty attracting broadband service providers. These characteristics can make the fixed cost of providing broadband access too high, or limit potential demand, thus depressing the profitability of providing service. Clusters of lower service exist in sparsely populated areas, such as the Dakotas, eastern Montana, northern Minnesota, and eastern Oregon. Other low-service areas, such as the Missouri-Iowa border and Appalachia, have aging and declining numbers of residents. Nonetheless, rural areas in some States (such as Nebraska, Kansas, and Vermont) have higher-than expected broadband service, given their population characteristics, suggesting that policy, economic, and social factors can overcome common barriers to broadband expansion.

In general, rural America has shared in the growth of the Internet economy. Online course offerings for students in primary, secondary, post-secondary, and continuing education programs have improved educational opportunities, especially in small, isolated rural areas. Interaction among students, parents, teachers, and school administrators has been enhanced via online forums, which is especially significant given the importance of ongoing parental involvement in children's education.

Telemedicine and telehealth have been hailed as vital to health care provision in rural communities, whether simply improving the perception of locally provided health care quality or expanding the menu of medical services. More accessible health information, products, and services confer real economic benefits on rural communities, reducing transportation time and expenses, treating emergencies more effectively,

reducing time missed at work, increasing local lab and pharmacy work, and providing savings to health facilities from outsourcing specialized medical procedures.

Most employment growth in the U.S. over the last several decades has been in the service sector, a sector especially conducive for broadband applications. Broadband allows rural areas to compete for low- and high-end service jobs, from call centers to software development. Rural businesses have been adopting more e-commerce and Internet practices, improving efficiency and expanding market reach. Some rural retailers use the Internet to satisfy supplier requirements. The farm sector, a pioneer in rural Internet use, is increasingly comprised of farm businesses that purchase inputs and make sales online. Farm household characteristics such as age, education, presence of children, and household income are significant factors in adopting broadband Internet use, whereas distance from urban centers is not a factor. Larger farm businesses are more apt to use broadband in managing their operation; the more multifaceted the farm business, the more the farm uses the Internet.

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance (CFDA) number assigned to this program is 10.886, Rural Broadband Access Loans and Loan Guarantees. The Catalog is available on the Internet and the General Services Administration's (GSA's) free CFDA website at <http://www.cfda.gov>. The CFDA website also contains a PDF file version of the Catalog that, when printed, has the same layout as the printed document that the Government Printing Office (GPO) provides. GPO prints and sells the CFDA to

interested buyers. For information about purchasing the Catalog of Federal Domestic Assistance from GPO, call the Superintendent of Documents at 202-512-1800 or toll free at 866-512-1800, or access GPO's online bookstore at <http://bookstore.gpo.gov>.

#### Executive Order 12372

This rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require a consultation with State and local officials. See the final rule related notice entitled, “Department Programs and Activities Excluded from Executive Order 12372” (50 FR 47034).

#### Executive Order 13563

The agency has reviewed this regulation pursuant to EO 13563, issued on January 18, 2011 (76 FR3281, January 21, 2011). EO 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in EO 12866. To the extent permitted by law, agencies are required by EO 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather

than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

#### Information Collection and Recordkeeping Requirements

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), the RUS invites comments on this information collection for which approval from the Office of Management and Budget (OMB) will be requested. These requirements have been approved by emergency clearance under OMB Control Number 0572-0130.

Comments must be received by [INSERT DATE 60 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments are invited on (a) whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of burden including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques on other forms of information technology.

Title: 7 CFR 1738, Rural Broadband Loan and Loan Guarantee Program.

OMB Control Number: 0572-0130.

Type of Request: Extension of an existing collection.

Abstract: The Rural Utilities Service is authorized under Title VI of the Rural Electrification Act of 1936, as amended (RE Act), to provide loans and loan guarantees to fund the cost of construction, improvement, or acquisition of facilities and equipment for the provision of broadband service in eligible rural areas in States and Territories of the United States. In conjunction with this interim rulemaking, RUS is submitting an information collection package to OMB as required by the Paperwork Reduction Act of 1995. The information collection package for 7 CFR 1738 includes the estimated burden related to the application process for the Rural Broadband Loan and Loan Guarantee Program. Since the inception of the program in 2003, the Agency has tried to accurately determine the burden to respondents applying for a Rural Broadband Loan, including soliciting comments from the public. The items covered by this collection include forms and related documentation to support a loan application, including Form 532 and its supporting schedules.

The 2014 Farm Bill requires that the Agency be more transparent when identifying entities that are applying for funding, set the definition of unserved areas, address defaulted loans, and provide incentives for applicants to provide service in the most remote unserved rural areas. To accomplish the goals above, the Agency has: (1) established a process for prioritizing applications; (2) set a minimum acceptable level of broadband service; (3) established a percentage of unserved households to receive broadband service; (4) provided additional details on the contents of applications; and (5) added additional incentives for reaching unserved areas.



The Agency has addressed these issues as follows:

**Prioritizing Applications:** To ensure that the priority requirements of the 2014 Farm Bill and this regulation are effectuated, a minimum of two evaluation periods will be established for ranking applications. At present, the Agency expects that evaluations will be conducted in March and September, but a notice in the Federal Register will be published, announcing the opening of each window and the deadlines for applications.

**Broadband Service:** With the growing need for bandwidth in the medical and business environments, as well as for the average user, the 2014 Farm Bill established a minimum acceptable level of broadband service at 4 megabits downstream and 1 megabit upstream, which the Agency will use as the benchmark for determining whether broadband service exists in an area. However, with respect to minimum standards for applications requesting funding, the Agency will be continuing its practice of a Broadband Lending Speed, which will require applicants to make available a minimum amount of bandwidth to all premises in the proposed funded service area. As with the prior broadband program, that standard will be updated from time to time in the Federal Register.

The definitions for Broadband Service and the Broadband Lending Speed are integral parameters for the administration of this program and the determination of what entities are eligible to apply for funds. Although the minimum level for Broadband Service is established by statute in the 2014 Farm Bill, this regulation allows for the standard to be

raised as the need for additional bandwidth is required by the public. Therefore, we are requesting and encouraging commenters to this regulation to make recommendations on the bandwidth requirements for both Broadband Service and the Broadband Lending Speed. The level for Broadband Service will be used to determine eligibility of a service area for funding and the level for the Broadband Lending Speed will set the bandwidth requirement that a proposed system must be able to provide to every customer in the service area.

With the development of new applications and the need for greater bandwidth, the Agency strongly suggests that applicants applying for funding under this program consider system designs that will allow for 25 megabits downstream and 3 megabits upstream. Building to these requirements will ensure that facilities that are constructed today will also be able to handle the needs of the future.

**Application Transparency:** To ensure transparency for the Broadband Loan Program, the Agency's mapping tool will be modified to include the following information for each application:

1. Identity of the applicant
2. The areas to be served
3. The type of funding requested
4. The status of the application
5. The number of unserved households
6. A list of the census block groups to be served

For all applications that are approved, an additional report will be posted that includes the name of the company receiving funding, type of funding received and the purposes of the funding.

Additionally, in accordance with 2014 Farm bill requirements, a requirement has been added to require borrowers to submit semi-annual reports for three years after the completion of construction. It is anticipated that this reporting requirement will not become effective until approximately three years from the effective date of this rulemaking. At that time the agency will need to revise the information collection package associated with reporting requirements for the Broadband Loan Program (0572-0031). Information collected will consist of the following items;

1. The number and location of residences and businesses that will receive service at or greater than the broadband lending speed;
2. The types of facilities constructed and installed;
3. The speed of the broadband services being delivered;
4. The average price of the broadband services being delivered in each proposed service area;
5. The broadband adoption rate for each proposed service territory, including the number of new subscribers generated from the facilities funded;

This information will be used to analyze the effectiveness of the funding provided and will allow the Agency to track adoption rates as new and improved broadband services are being provided.

The Agency seeks comments on its estimate of burden related to the application process for the Rural Broadband Program and welcomes comments related to further reducing application paperwork and costs. Specifically, comments should address the estimation of hour and cost burden associated with each component of RUS Form 532, available on the agency's website. Burden on respondents is considered to include the time, effort,

and financial resources expended to generate, maintain, retain, disclose, or provide information to or for a Federal Agency. The Agency is also interested in determining the information that Broadband applicants would have on hand in a format that could be readily provided for the loan application and which items would be prepared by parties outside the applicant's organization. Comments may be sent to Michele Brooks, Director, Program Development and Regulatory Analysis, Rural Development, U.S. Department of Agriculture, 1400 Independence Ave., SW., Stop 1522, Room 5159 South Building, Washington, D.C. 20250-1522 or via e-mail to: [michele.brooks@usda.gov](mailto:michele.brooks@usda.gov).

**Estimate of Burden:** Public reporting for this collection of information is estimated to average 425.5 hours per response.

**Respondents:** Businesses and Not-for-profit institutions.

**Estimated Number of Respondents:** 5.

**Estimated Total Annual Burden on Respondents:** 2094.5 hours.

Copies of this information collection can be obtained from Michele Brooks, Program Development and Regulatory Analysis, at (202) 690-1078.

All responses to this information collection and recordkeeping notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

National Environmental Policy Act Certification

The Administrator has determined that this rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). Therefore, this action does not require an environmental impact statement or assessment.

#### Regulatory Flexibility Act Certification

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because the Agency is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all state and local laws and regulations that are in conflict with this rule will be preempted, no retroactive effort will be given to this rule, and, in accordance with Sec. 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. Sec. 6912(e)), administrative appeal procedures, if any, must be exhausted before an action against the Department or its agencies may be initiated.

#### Unfunded Mandates

This rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments

or the private sector. Thus, this rule is not subject to the requirements of section 202 and 205 of the Unfunded Mandates Reform Act of 1995.

#### Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the States is not required.

#### Executive Order 13175, Consultation and Coordination With Indian Tribal

##### Governments

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Rural Development has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal

consultation under EO 13175. However, since deploying broadband infrastructure throughout Indian Country presents unique challenges, the Agency commits to provide at least one Tribal Consultation focused on those unique challenges (and potential solutions) prior to the implementation of this rule. If a Tribe requests consultation, Rural Development will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress. If a tribe would like to engage in consultation with Rural Development on this rule, please contact Rural Development's Native American Coordinator at (720) 544-2911 or [AIAN@wdc.usda.gov](mailto:AIAN@wdc.usda.gov).

#### E-Government Act Compliance

The Agency is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. The Agency is currently developing an online application system that will replace the existing manual process for submitting applications.

#### Background

##### A. Introduction

The Agency improves the quality of life in rural America by providing investment capital for deployment of rural telecommunications infrastructure. In order to achieve the

goal of increasing economic opportunity in rural America, the Agency finances infrastructure that enables access to a seamless, nationwide telecommunications network. With access to the same advanced telecommunications networks as its urban counterparts, especially those designed to accommodate distance learning, telework, and telemedicine, rural America will eventually see improving educational opportunities, health care, economies, safety and security, and ultimately higher employment. The Agency shares the assessment of Congress, State and local officials, industry representatives, and rural residents that broadband service is a critical component to the future of rural America. The Agency is committed to ensuring that rural America will have access to affordable, reliable, broadband services and to provide a healthy, safe, and prosperous place to live and work.

## B. Regulatory History

On May 13, 2002, the Farm Security and Rural Investment Act of 2002, Pub. L. 107-171 (2002 Farm Bill) was signed into law. The 2002 Farm Bill amended the Rural Electrification Act of 1936 to include Title VI, the Rural Broadband Access Loan and Loan Guarantee Program (Broadband Loan Program), to be administered by the Agency. Title VI authorized the Agency to approve loans and loan guarantees for the costs of construction, improvement, and acquisition of facilities and equipment for broadband service in eligible rural communities. Under the 2002 Farm Bill, the Agency was directed to promulgate regulations without public comment. Implementing the program required a different lending approach for the Agency than it employed in its earlier telephone program because of the unregulated, highly competitive, and technologically



diverse nature of the broadband market. Those regulations were published on January 30, 2003, at 68 FR 4684.

In an attempt to enhance the Broadband Loan Program and to acknowledge growing criticism of funding competitive areas, the Agency proposed to amend the program's regulations on May 11, 2007, at 72 FR 26742. As the Agency began analysis of the public comments it received on the proposed regulations, the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) was working its way through Congress. On March 14, 2011, the Agency published an interim rule implementing the requirements of the 2008 Farm Bill and started accepting applications. The Agency did not receive any significant comments to the interim rule and published a final rule on February 6, 2013. With the enactment of the Agricultural Act of 2014 (2014 Farm Bill) Section 6104, Public Law 113-79 (Feb. 7, 2014), additional requirements were added to the Broadband Loan Program, including the prioritization of approving applications, a minimum benchmark of broadband service, a more transparent public notice requirement, and the first statutorily required reporting standards, all of which are implemented in this rule.

### C. Presidential Memorandum

On March 23, 2015, a Presidential Memorandum was issued for Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training. The memorandum states that it shall be the policy of the Federal Government for executive departments and agencies having statutory authorities applicable to broadband deployment (agencies) to use all available and appropriate authorities to: identify and address regulatory barriers that may unduly impede either

wired broadband deployment or the infrastructure to augment wireless broadband deployment; encourage further public and private investment in broadband networks and services; promote the adoption and meaningful use of broadband technology; and otherwise encourage or support broadband deployment, competition, and adoption in ways that promote the public interest. In addition to assist in this effort, there is established the Broadband Opportunity Council (Council), to be co-chaired by the Secretaries of Commerce and Agriculture, or their designees. In addition to the Co-Chairs, the Council shall include the heads, or their designees, of:

- i. the Department of Defense;
- ii. the Department of State;
- iii. the Department of the Interior;
- iv. the Department of Labor;
- v. the Department of Health and Human Services;
- vi. the Department of Homeland Security;
- vii. the Department of Housing and Urban Development;
- viii. the Department of Justice;
- ix. the Department of Transportation;
- x. the Department of the Treasury;
- xi. the Department of Energy;
- xii. the Department of Education;
- xiii. the Department of Veterans Affairs;
- xiv. the Environmental Protection Agency;

- xv. the General Services Administration;
- xvi. the Small Business Administration;
- xvii. the Institute of Museum and Library Services;
- xviii. the National Science Foundation;
- xix. the Council on Environmental Quality;
- xx. the Office of Science and Technology Policy;
- xxi. the Office of Management and Budget;
- xxii. the Council of Economic Advisers;
- xxiii. the Domestic Policy Council;
- xxiv. the National Economic Council;
- xxv. the National Security Council staff; and
- xxvi. such other Federal agencies or entities as determined appropriate pursuant to subsection (c) of this section.

#### D. Rule Changes

The following summarizes the substantive changes introduced in this rule. The changes are presented in the order in which they appear within the interim rule.

##### Subpart A – General

##### Section 1738.2 Definitions

Broadband service – This definition was modified to incorporate the 2014 Farm Bill’s requirement that the minimum level of broadband service be initially set to 4 megabits downstream and 1 megabit upstream, and reviewed by the Agency at least once every 2

years, and adjusted as necessary through a notice published in the Federal Register, in order to ensure that high quality, cost-effective broadband service is being provided to rural areas. This definition will be used to determine if a rural area is eligible for funding.

Incumbent service provider – This definition was modified so as not to automatically eliminate an existing service provider from being counted as an incumbent service provider if the provider did not respond to the public notice filing for new applications. The 2014 Farm Bill requires that the Agency use all means available to determine if an incumbent service provider is present in a proposed funded service area. As a result, only in cases where the Agency is unable to make an incumbent determination without input from the provider, will a provider not be counted as an incumbent for not responding to a request for information. The determination of incumbent service providers is critical to whether a loan is eligible for the broadband program.

Interim financing – This definition was modified to make only construction started after a loan has been offered as eligible for reimbursement, as opposed to the prior rule which allowed for construction started after an application was deemed “complete” to be eligible for reimbursement. Because of the new requirement to prioritize applications within at least two evaluation periods, and not process applications on a first-come, first-served basis, applications which are feasible, but not the highest priority, may never be funded. As a result, the Agency has changed its policy on when construction is eligible for reimbursement.

Unserved household or unserved area – The 2014 Farm Bill removed the definition for underserved and introduced the definition of unserved. All proposed funded service areas must include a minimum of fifteen percent unserved households.

#### Section 1738.3 Substantially underserved trust area

In March of 2012, the Agency published 7 CFR part 1700 as a final rule instituting eligibility requirements for classifying an area as a Substantially Underserved Trust Area and making certain considerations available for those areas that qualify. The changes to this section incorporate this regulation by reference and allow for applicants to seek classification as a Substantially Underserved Trust Area and associated benefits of this classification.

#### Subpart B – Eligible and Ineligible Loan Purposes

Section 1738.51(b) – A statement was added to this section to clarify that if an Indefeasible Right to Use (IRU) agreement qualifies as a capital lease, the entire cost of the lease will be amortized over the life of the lease and that only the first three years of the amortization period can be funded.

#### Subpart C – Eligibility Requirements

Section 1738.101(b)(2) – The existing regulations require that facilities be constructed within three years from the time loan funds are made available. Given the many factors affecting when loan funds are available, the Agency has decided to simplify this

requirement by making funds available 120 days after the date of the loan contract, which is the time allotted for closing a loan. The three-year construction period will commence 120 days after the date of the loan contract. This uniform change will bring clarity to applicants and assist their budgeting of time.

Section 1738.102(c) – This section was added to address the new 2014 Farm Bill requirement that the Agency determine if there are incumbent service providers in a proposed funded service area. In addition to the current use of the public notice process, the Agency will now utilize the National Broadband Map and any other data that may be available detailing service provider information in the affected area to make this determination. This process will assist the Agency in identifying ineligible areas, despite any non-responses from existing service providers.

#### Subpart D – Direct Loan Terms

Section 1738.155 – Most areas in the U.S. that still do not have broadband service are areas with low population densities or very tough geographic conditions which impede construction. Under these conditions, it is very difficult to develop a feasible business plan that the Agency can fund. To assist and encourage companies to venture into difficult rural areas, the 2014 Farm Bill permitted modifications to the standard lending terms. As a result, the Agency, at its discretion, may consider the following for applications that propose to serve areas that contain a minimum of 50 percent unserved households and that request special terms: (1) an extension of the standard 2-year principal deferral period up to a maximum of 4 years; 2) an extension of the maturity

period beyond economic life of the assets; and 3) a modification to the security arrangements for the loan. These three options individually or together may assist in the development of a successful business by reducing the initial debt service payments and allowing borrowers more time to develop operations and positive cash flow. Special terms are only authorized to the extent they are necessary to achieve financial feasibility and long-term sustainability of these projects.

#### Subpart E – Application Review and Underwriting

Section 1738.203 – In accordance with 2014 Farm Bill requirements, this section has been modified to require applications to be evaluated and prioritized no less than twice a year, based on the number of unserved household proposed to receive service at the broadband lending speed. This process will ensure that the maximum number of unserved residents and businesses receive broadband service.

National and State reserves will be established based on the amount of funding provided for any given fiscal year. Please note that depending on the amount of funding provided, it may not be appropriate to establish State reserves.

Section 1738.204 – To better inform the public of the applications that are being submitted for financial assistance, the public notice that the Agency publishes through the use of the Agency’s mapping tool will now include the following additional information: 1) amount and type of funding requested; 2) status of the review of the application; 3) the number of unserved households in the application; and 4) a list of census block groups to

be served. In addition, for all approved applications, an additional notice will be published on the Agency webpage that includes the name of the entity being funded, the type of funding received, and the purpose of the assistance. All applicants that are approved for funding will also be required to submit semiannual reports that will be published on the webpage. This information will better allow the public to understand where taxpayer dollars are being spent and what is being accomplished.

#### Subpart F – Closing, Servicing and Reporting

Section 1738.254 – In accordance with 2014 Farm Bill requirements, an additional requirement has been added to this section that requires borrowers to submit semi-annual reports for three years after the completion of construction. The report must include the purpose of the financing, number and location of the premises served, speed of the broadband service being delivered, average price of the services and the adoption rate of the services being provided. This report will allow the Agency to better track the progress of the loan and validate that the funds are being used for the purposes in the application.

The Agency urges all interested parties to provide comments. Please see instructions on how to do so in the “ADDRESSES” section of this document.

#### USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination against its customers, employees, and applicants for employment on the bases of race, color, national origin, age, disability, sex, gender identity, religion, reprisal, and where



applicable, political beliefs, marital status, familial or parental status, sexual orientation, or all or part of an individual's income is derived from any public assistance program, or protected genetic information in employment or in any program or activity conducted or funded by the Department. (Not all prohibited bases will apply to all programs and/or employment activities.

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If you wish to file a Civil Rights program complaint of discrimination, complete the USDA Program Discrimination Complaint Form (PDF), found online at [http://www.ascr.usda.gov/complaint\\_filing\\_cust.html](http://www.ascr.usda.gov/complaint_filing_cust.html), or at any USDA office, or call (866) 632-9992 to request the form. You may also write a letter containing all of the information requested in the form. Send your completed complaint form or letter to us by mail at U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue, S.W., Washington, D.C. 20250-9410, by fax (202) 690-7442 or email at [program.intake@usda.gov](mailto:program.intake@usda.gov).

Individuals who are deaf, hard of hearing or have speech disabilities and you wish to file either an EEO or program complaint please contact USDA through the Federal Relay Service at (800) 877-8339 or (800) 845-6136 (in Spanish).

Persons with disabilities who wish to file a program complaint, please see information above on how to contact us by mail directly or by email. If you require alternative means of communication for program information (e.g., Braille, large print, audiotape, etc.) please contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

#### List of Subjects in 7 CFR Part 1738

Broadband, Loan programs-communications, Rural areas, Telephone, Telecommunications.

Accordingly, chapter XVII, title 7, Code of Federal Regulations is amended by revising part 1738 to read as follows:

## **PART 1738 – RURAL BROADBAND ACCESS LOANS AND LOAN GUARANTEES**

### **Subpart A - General**

1738.1 Overview.  
1738.2 Definitions.  
1738.3 Substantially underserved trust areas.  
1738.4 – 1738.50 [Reserved]

### **Subpart B - Eligible and Ineligible Loan Purposes**

1738.51 Eligible loan purposes.  
1738.52 Ineligible loan purposes.  
1738.53 – 1738.100 [Reserved]

### **Subpart C – Eligibility Requirements**

- 1738.101 Eligible applicants.
- 1738.102 Eligible service area.
- 1738.103 Eligible service area exceptions for broadband facility upgrades.
- 1738.104 Preliminary assessment of service area eligibility.
- 1738.105 – 1738.150 [Reserved]

#### **Subpart D – Direct Loan Terms**

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**Authority:** 7 U.S.C. 901 et seq.

## **Subpart A - General**

### **§ 1738.1 Overview.**

(a) The Rural Broadband Access Loan and Loan Guarantee Program furnishes loans and loan guarantees for the costs of construction, improvement, or acquisition of facilities and equipment needed to provide service at the broadband lending speed in eligible rural areas. This part sets forth the general policies, eligibility requirements, types and terms of loans and loan guarantees, and program requirements under 7 U.S.C. 901 et seq.

(b) Additional information and application materials regarding the Rural Broadband Access Loan and Loan Guarantee Program can be found on the Rural Development website.

### **§ 1738.2 Definitions.**

(a) The following definitions apply to part 1738:

Acquisition means the purchase of assets by acquiring facilities, equipment, operations, licenses, or majority stock interest of one or more organizations. Stock acquisitions must be arm's-length transactions.

Administrator means the Administrator of the Rural Utilities Service (RUS), or the Administrator's designee.

Advance means the transfer of loan funds from the Agency to the borrower.

Affiliate or affiliated company of any specified person or entity means any other person or entity directly or indirectly controlling of, controlled by, under direct or indirect common control with, or related to, such specified entity, or which exists for the sole purpose of providing any service to one company or exclusively to companies which otherwise meet the definition of affiliate. This definition includes Variable Interest Entities as described in Financial Accounting Standards Board Interpretation (FIN) No. 46(R), *Consolidation of Variable Interest Entities*. For the purpose of this definition, "control" means the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership voting of securities, common directors, officers, or stockholders, voting trust, or holding trusts (other than money exchanged) for property or services.

Agency means the Rural Utilities Service, which administers the United States Department of Agriculture's (USDA's) Rural Development Utilities Programs, including the Rural Broadband Access Loan and Loan Guarantee Program.

Applicant means an entity requesting approval of a loan or loan guarantee under this part.

Arm's-length transaction means a transaction between two related or affiliated parties that is conducted as if they were unrelated, so that there is no question of conflict of interest, or a transaction between two otherwise unrelated or unaffiliated parties.

Borrower means any organization that has an outstanding broadband or telecommunications loan made or guaranteed by the Agency.

Broadband borrower means any organization that has an outstanding broadband loan made or guaranteed by the Agency.

Broadband grant means a Community Connect or Broadband Initiatives Program grant approved by the Agency.

Broadband lending speed means the minimum bandwidth requirement, as published by the Agency in its latest notice in the Federal Register that an applicant must propose to deliver to every customer in the proposed funded service area in order for the Agency to approve a broadband loan and may be different for fixed and mobile broadband service. Broadband lending speed may be faster than the minimum transmission capacity required to determine the availability of broadband service when qualifying a service area. If a new broadband lending speed is published in the Federal Register while an application is pending, the pending application will be processed based on the broadband lending speed that was in effect when the application was submitted.

Broadband loan means any loan approved under Title VI of the Rural Electrification Act of 1936, as amended (RE Act).

Broadband service means any technology identified by the Administrator as having the capacity to provide transmission facilities that enable the subscriber to receive a minimum level of service equal to at least a downstream transmission capacity of 4

megabits per second (Mbps) and an upstream transmission capacity of 1 Mbps. The Agency will publish the minimum transmission capacity that will qualify as broadband service in a notice in the Federal Register and this rate may be different for fixed and mobile broadband service. The minimum transmission capacity may be higher than 4 Mbps downstream and 1 Mbps upstream but cannot be lower. The minimum transmission capacity that defines broadband service may be different than the broadband lending speed. If a new minimum transmission capacity is published in the Federal Register while an application is pending, broadband service for the purpose of reviewing the application will be defined by the minimum transmission capacity that was required at the time the application was received by the Agency.

Build-out means the construction, improvement, or acquisition of facilities and equipment.

Competitive analysis means a study that identifies service providers and products in the service area that will compete with the applicant's operations.

Composite economic life means the weighted (by dollar amount of each class of facility in the loan) average economic life as determined by the Agency of all classes of facilities financed by the loan.

Cost share means equity, as defined by generally accepted accounting principles (GAAP).

Customer premises equipment (CPE), in the context of network services, means any network-related equipment used by a customer to connect to a service provider's network.

Economic life means the estimated useful service life of an asset financed by the loan, as determined by the Agency.

Equity means total assets minus total liabilities, as determined by GAAP and as classified according to the Agency's system of accounts, and as used in this Part for purposes of section 306F of the RE Act (7 USC 936f) includes the requirements of credit support and cost share in Title VI of the RE Act.

Feasibility study means the evaluation of the pro forma financial analysis prepared by the Agency, based on the financial projections supplied by the applicant and as found acceptable by the Agency, to determine the financial feasibility of a loan request.

Financial feasibility means the applicant's ability to generate sufficient revenues to cover its expenses, sufficient cash flow to service its debts and obligations as they come due, and meet the minimum Times Interest Earned Ratio (TIER) requirement of 1.25 (see § 1738.211(b)(2)(ii)) by the end of the forecast period, as evaluated by the Agency. Financial feasibility of a loan application is based on five-year projections, and will be based on the entire operation of the applicant and not limited to the funded project.

Fiscal year refers to the applicant or borrower's fiscal year, unless otherwise indicated.

Forecast period means the time period used in the feasibility study to determine if an application is financially feasible.

GAAP means generally accepted accounting principles.



Grantee means any organization that has an outstanding broadband grant made by the Agency, with outstanding obligations under the grant.

Guaranteed loan amount means the amount of the loan which is guaranteed by the Agency.

Guaranteed loan note means, collectively, the note or notes executed and delivered by the borrower to evidence the guaranteed loan.

Guaranteed loan portion means any portion of the guaranteed loan.

Guaranteed loan portion amount means that amount of payment on account of any guaranteed loan portion which is guaranteed under the terms of the guarantee.

Guaranteed loan portion note means any note executed and delivered by the borrower to evidence a guaranteed loan portion.

Incumbent service provider means a service provider that: offers terrestrial broadband service in the proposed funded service area and has not less than five percent of the households in an applicant's proposed funded service area subscribing to their broadband service at the time of application submission. Resellers are not considered incumbent service providers. If an applicant proposes an acquisition, the applicant will be considered a service provider for that area.

Indefeasible right to use agreement (IRU) means the effective long-term lease of the capacity, or a portion thereof, of a cable, specified in terms of a certain amount of bandwidth or a certain number of dark fibers.

Interim financing means funds used for eligible loan purposes after a loan offer has been extended to the applicant by the Agency. Such funds may be eligible for reimbursement from loan funds if a loan is made.

Loan means any loan made or guaranteed under this part by the Agency, unless otherwise noted.

Loan contract means the loan agreement between the Agency and the borrower, including all amendments thereto.

Loan documents mean the loan agreement, note(s), and security instrument(s) between the borrower and the Agency and any associated documents pertaining to the broadband loan.

Loan guarantee means a guarantee of a loan, or a portion of a loan, made by another lender

Loan guarantee documents means the guarantee agreement between RUS and the lender, the loan and security agreement(s) between the guaranteed lender and the borrower, the loan note guarantee made by RUS, the guaranteed loan note, and other security documents.

Loan funds means funds provided pursuant to a broadband loan made or guaranteed under this part by the Agency.

Market survey means the collection of information on the supply, demand, usage, and rates for proposed services to be offered by an applicant within each service area. It supports the applicant's financial projections.

Pre-loan expense means any expense associated with the preparation of a loan application. Pre-loan expenses may be reimbursed with loan funds, as approved by RUS.

Proposed Funded Service Area means the geographic service territory within which the applicant is proposing to offer service at the broadband lending speed.

RE Act means the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 et seq.).

Reject means that the Agency returns the application to the applicant and discontinues processing of the loan application because the application failed to meet the requirements of this part.

Reseller means, in the context of network services, a company that purchases network services from network service providers in bulk and resells them to commercial businesses and residential households. Resellers are not considered incumbent service providers.

Rural area(s) means any area, as confirmed by the latest decennial census of the Bureau of the Census, which is not located within:

(i) A city, town, or incorporated area that has a population of greater than 20,000 inhabitants; or

(ii) An urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the U.S. Census Bureau.

Security documents means any mortgage, deed of trust, security agreement, financing statement, or other document which grants to the Agency or perfects a security interest, including any amendments and supplements thereto.

Service area means the geographic area within which a service provider offers telecommunications service.

Service provider means an entity providing telecommunications service.

Service territory means “service area.”

Start-up means a new business venture without operations or service delivery available.

System of accounts means the Agency’s system of accounts for maintaining financial records as described in RUS Bulletin 1770B-1, found on the agency’s website.

Telecommunications means electronic transmission and reception of voice, data, video, and graphical information using wireline and wireless transmission media.

Telecommunications loan means any telecommunication loan made or guaranteed under Title II, III, or IV of the RE Act.

TIER means times interest earned ratio. TIER is the ratio of an applicant's net income (after taxes) plus (adding back) interest expense, all divided by interest expense (existing and that required in the proposed loan), and with all financial terms defined by GAAP.

Unguaranteed loan amount means all amounts of payment on account of the guaranteed loan other than the guaranteed amount.

Unguaranteed loan portion amount means all amounts of payment on account of any guaranteed loan portion other than the respective guaranteed loan portion amount.

Unserved household or Unserved area means a household or an area that is not offered broadband service.

(b) Accounting terms not otherwise defined in this part shall have the definition ascribed to them under GAAP and shall be recorded using the Agency’s system of accounts.

**§ 1738.3 Substantially underserved trust areas.**

(a) If the Administrator determines that a community within “trust land” (as defined in 38 U.S.C. 3765) has a high need for the benefits of the Broadband Loan Program, he/she may designate the community as a “substantially underserved trust area” (as defined in section 306F of the RE Act).

(b) To receive consideration as a substantially underserved trust area, the applicant must submit to the Agency a completed application that includes all of the information requested in 7 CFR part 1700, subpart D. In addition, the applicant must notify the Agency in writing that it seeks consideration as a substantially underserved trust area and identify the discretionary authorities of 7 CFR part 1700, subpart D, it seeks to have applied to its application. Note, however, that given the prohibition on funding operating expenses in the Broadband Program, requests for waiver of the equity or the additional cash requirements cannot be considered.

#### **§§ 1738.4 – 1738.50 [Reserved]**

### **Subpart B - Eligible and Ineligible Loan Purposes**

#### **§ 1738.51 Eligible loan purposes.**

Loan funds may be used to pay for any of the following expenses:

(a) To fund the construction, improvement, or acquisition of all facilities required to provide service at the broadband lending speed to rural areas, including facilities required for providing other services over the same facilities.

(b) To fund the cost of leasing facilities required to provide service at the broadband lending speed if such lease qualifies as a capital lease under GAAP.

Notwithstanding, loan funds can only be used to fund the cost of the capital lease for no

more than the first three years of the loan amortization period. If an IRU qualifies as a capital lease, the entire cost of the lease will be amortized over the life of the lease and only the first three years of the amortized cost can be funded.

(c) To fund an acquisition, provided that:

(1) The acquisition is necessary for furnishing or improving service at the broadband lending speed;

(2) The acquired service area, if any, meets the eligibility requirements set forth in § 1738.102;

(3) The acquisition cost does not exceed 50 percent of the broadband loan amount; and

(4) For the acquisition of another entity, the purchase provides the applicant with a controlling majority interest in the entity acquired.

(d) To refinance an outstanding telecommunications loan made under the RE Act if refinancing the loan supports the construction, improvement, or acquisition of facilities and equipment for the provision of service at the broadband lending speed in rural areas provided that:

(1) No more than 40 percent of the broadband loan amount is used to refinance the outstanding telecommunications loan;

(2) The applicant is current with its payments on the telecommunication loan(s) to be refinanced; and

(3) The amortization period for that portion of the broadband loan that will be needed for refinancing will not exceed the remaining amortization period for the telecommunications loan(s) to be refinanced. If multiple notes are being refinanced, an

average remaining amortization period will be calculated based on the weighted dollar average of the notes being refinanced.

(e) To fund pre-loan expenses in an amount not to exceed five percent of the broadband loan excluding amounts requested to refinance outstanding telecommunication loans. Pre-loan expenses may be reimbursed only if they are incurred prior to the date on which notification of a complete application is issued (see § 1738.205), they meet the requirements for reimbursement (found on the agency's website) and a loan contract is entered into with RUS.

**§ 1738.52 Ineligible loan purposes.**

Loan funds must not be used for any of the following purposes:

- (a) To fund operating expenses of the applicant;
- (b) To fund any costs associated with the project incurred prior to the date on which notification of a complete application is issued (see § 1738.205), except for eligible pre-loan expenses (see § 1738.51(e)).
- (c) To fund the acquisition of the stock of an affiliate.
- (d) To fund the purchase or acquisition of any facilities or equipment of an affiliate, unless approved by the Agency in writing. The Agency may approve such a purchase or acquisition if the applicant demonstrates that the purchase or acquisition will involve an arms-length transaction and that the cost is advantageous for the applicant.
- (e) To fund the purchase of CPE and the installation of associated inside wiring, unless the CPE will be owned by the applicant throughout its economic life: or

(1) The applicant pledges additional collateral that is not currently owned by the applicant, acceptable to the Agency. Such collateral must have a value at least equal to the purchase price of the CPE and cannot be purchased with loan funds; or

(2) The applicant establishes a revolving fund for the initial purchase of CPE to be sold, and as CPE is sold to the customer, at least the applicant's cost of such equipment is returned to the revolving fund and used to purchase additional CPE units.

(f) To fund the purchase or lease of any vehicle unless it is used primarily in construction or system improvements.

(g) To fund the cost of systems or facilities that have not been designed and constructed in accordance with the loan contract and other applicable requirements.

(h) To fund broadband facilities leased under the terms of an operating lease.

(i) To fund merger or consolidation of entities.

**§§ 1738.53 – 1738.100 [Reserved]**

### **Subpart C - Eligibility Requirements**

#### **§ 1738.101 Eligible applicants.**

(a) To be eligible for a broadband loan, an applicant may be either a nonprofit or for-profit organization, and must take one of the following forms:

(1) Corporation;

(2) Limited liability company (LLC);

(3) Cooperative or mutual organization;

(4) Indian tribe or tribal organization as defined in 25 U.S.C. 450b; or

(5) State or local government, including any agency, subdivision, or instrumentality thereof.



(b) To be eligible for a broadband loan, the applicant must:

(1) Submit a loan application which meets the requirements set forth in this part as well as any additional requirements published in the Federal Register;

(2) Agree to complete the build-out of the broadband system described in the loan application within three years from the day the applicant is notified that loan funds are available. Under the terms of the loan documents, this three- year period will commence 120 days after the date of the loan contract. The loan application must demonstrate that all proposed construction can be completed within this three-year period with the exception of CPE. CPE can be funded throughout the forecast period;

(3) Demonstrate an ability to furnish, improve, or extend broadband facilities to provide service at the broadband lending speed in the proposed funded service area;

(4) Demonstrate an equity position equal to at least 10 percent of the amount of the loan requested in the application (see § 1738.207); and

(5) Provide additional security if it is necessary to ensure financial feasibility (see § 1738.208) as determined by the Administrator.

**§ 1738.102 Eligible service area.**

(a) A service area may be eligible for a broadband loan if all of the following are true:

(1) The proposed funded service area is completely contained within a rural area;

(2) At least 15 percent of the households in the proposed funded service area are unserved households;

(3) No part of the proposed funded service area has three or more incumbent service providers; and

(4) No part of the proposed funded service area overlaps with the service area of current RUS borrowers, nor the services areas of grantees that were funded by RUS.

(b) Multiple service areas may be included in a single broadband loan application. Non-contiguous areas are considered separate service areas and must be treated separately for the purpose of determining service area eligibility. If non-contiguous areas within an application are determined to be ineligible, the Agency may consider the remaining areas in the application for eligibility. If an applicant fails to respond to Agency requests for additional information or modifications to remove ineligible areas, the application will be rejected.

(c) If no existing broadband service provider responds to the Public Notice as described in § 1738.204(b), then the number of incumbent service providers for § 1738.102(a)(3) will be determined by using:

- (1) The most current National Broadband Map; or
- (2) Any other data regarding the availability of broadband service that the Secretary may collect or obtain through reasonable efforts.

(d) If a service provider is identified by methods described in paragraphs (c)(1) or (2) of this section, and the Agency is unable to determine whether such provider is an incumbent service provider, as defined herein, then the Agency will request the service provider to provide information responding to the Public Notice for the loan application, demonstrating that they meet the definition for an incumbent service provider. If the service provider does not respond to the Agency's request within 30 calendar days providing the necessary information to make a determination, the provider will not be considered an incumbent service provider.

**§ 1738.103 Eligible service area exceptions for broadband facility upgrades.**

(a) Broadband borrowers that apply to upgrade existing broadband facilities in their existing service area are exempt from the requirement concerning the number of unserved households in § 1738.102(a)(2).

(b) Incumbent service providers, including borrowers and grantees, which apply to upgrade existing broadband facilities in existing service territories are exempt from the requirement concerning the number of incumbent service providers in § 1738.102(a)(3) unless they are eligible for funding under Titles II and III of the RE Act. Eligibility requirements for entities that would be eligible under Titles II and III can be found in 7 CFR part 1735.

(c) An applicant which is a borrower, grantee or incumbent service provider may submit one application to upgrade existing broadband facilities in existing service areas, which qualify for the exemptions specified in paragraphs (a) and (b) of this section, and to expand services at the broadband lending speed into new service areas, provided the upgrade area and the expansion area are proposed as two separate service areas even if the upgrade and expansion areas are contiguous.

(d) The applicant will be asked to remove areas determined to be ineligible from their funding request or provide funds other than loan funds for these areas. The application will then be evaluated on the basis of what remains. The applicant may be requested to provide additional information to the Agency relating to the ineligible areas. If the applicant fails to respond, the application will be returned.

**§ 1738.104 Preliminary assessment of service area eligibility.**

(a) Upon request, the Agency will make information available to prospective applicants to allow a preliminary assessment of a proposed service area's eligibility. At a minimum, the prospective applicant will be able to determine:

(1) Whether the proposed service area is located in a rural area;

(2) Whether the proposed service area overlaps with any part of a borrower's or grantee's service area; and

(3) Whether the proposed service area overlaps with any part of a proposed service area in a pending application for a loan.

(b) A preliminary assessment of service area eligibility does not account for all eligibility factors, and the situation within a proposed service area may change between the preliminary assessment and application submission. A preliminary assessment indicating that a proposed service area may be eligible does not guarantee that the area will remain eligible at the time of application.

#### **§§ 1738.105 – 1738.150 [Reserved]**

### **Subpart D - Direct Loan Terms**

#### **§ 1738.151 General.**

(a) Direct loans shall be in the form of a cost-of-money loan, a 4 percent loan, or a combination of the two.

(b) The amount of funds available for each type of loan, as well as maximum and minimum loan amounts will be published in the Federal Register.

(c) An applicant that provides telecommunications or broadband service to at least 20 percent of the households in the United States is limited to a loan amount that is no

more than 15 percent of the funds available to the Broadband Loan Program for the Federal fiscal year.

**§ 1738.152 Interest rates.**

(a) Direct cost-of-money loans shall bear interest at a rate equal to the cost of borrowing to the Department of Treasury for obligations of comparable maturity. The applicable interest rate will be set at the time of each advance.

(b) [Reserved]

**§ 1738.153 Loan terms and conditions.**

Terms and conditions of loans are set forth in a mortgage, note, and loan contract. Samples of the mortgage, note, and loan contract can be found on the Agency's website.

(a) Unless requested to be shorter by the applicant, broadband loans must be repaid with interest within a period that, rounded to the nearest whole year, is equal to the expected composite economic life of the assets to be financed, as determined by the Agency based upon acceptable depreciation rates. Expected composite economic life means the depreciated life plus three years.

(b) Loan advances are made at the request of the borrower. Principal payments for each advance are amortized over the remaining term of the loan and are due monthly. Principal payments will be deferred until two years after the date of the first advance of loan funds. Interest begins accruing when the advance is made and interest payments are due monthly, with no deferral period.

(c) Borrowers are required to carry fidelity bond coverage. Generally this amount will be 15 percent of the loan amount, not to exceed \$5 million. The Agency

may reduce the percentage required if it determines that the amount is not commensurate with the risk involved.

**§ 1738.154 Loan security.**

(a) The broadband loan must be secured by the assets purchased with the loan funds, as well as all other assets of the applicant and any other signer of the loan documents except as provided in § 1738.155.

(b) The Agency must be given an exclusive first lien, in form and substance satisfactory to the Agency, on all of the applicant's property and revenues and such additional security as the Agency may require. The Agency may share its first lien position with another lender on a pari passu, prorated basis if security arrangements are acceptable to the Agency.

(c) Unless otherwise designated by the Agency, all property purchased with loan funds must be owned by the applicant.

(d) In the case of loans that include financing of facilities that do not constitute self-contained operating systems, the applicant shall furnish assurance, satisfactory to the Agency, that continuous and efficient service at the broadband lending speed will be rendered.

(e) The Agency will require adequate financial, investment, operational, reporting, and managerial controls in the loan documents.

**§ 1738.155 Special terms and conditions.**

(a) When necessary to achieve financial feasibility and long-term sustainability of a project proposing to serve an area(s) that includes at least 50 percent unserved

households, the Agency may consider applications in which the applicant has requested any of the following:

(1) A principal deferral period longer than the 2 year principal deferral period established in accordance with § 1738.153(b), but in no event longer than 4 years nor more than 40 percent of the maturity period of the loan as set forth in § 1738.153(a);

(2) An extension of the loan term by 25 percent of the maturity period established in accordance with § 1738.153(a), but in no event longer than 35 years; and

(3) A modification to the security requirements, as long as the modifications are necessary to sustain the operation and do not prejudice the government's security for the loan. The modification must ensure that the proposed security arrangements are commensurate with the risk of the project.

(b) [Reserved]

#### **§ 1738.156 Other Federal requirements.**

(a) To receive a broadband loan, the applicant must certify or agree in writing to comply with all applicable Federal regulations including, but not limited to:

(1) The nondiscrimination and equal employment opportunity requirements of Title VI of the Civil Rights Act of 1964, as amended (7 CFR part 15);

(2) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794 et seq; 7 CFR Part 15b);

(3) The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 et seq.; 45 CFR Part 90);

(4) Executive Order 11375, amending Executive Order (E.O.) 11246, Relating to Equal Employment Opportunity (3 CFR, 1966 - 1970). See 7 CFR parts 15 and 15b and 45 CFR part 90, RUS Bulletin 1790-1 (“Nondiscrimination Among Beneficiaries of RUS Programs”), and RUS Bulletin 20-15:320-15 (“Equal Employment Opportunity in Construction Financed with RUS Loans”), found on the agency’s website;

(5) The Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 et seq.);

(6) The Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101-19.6);

(7) The requirements of the National Environmental Policy Act of 1969 (NEPA), as amended;

(8) The Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA and certain related Federal environmental laws, statutes, regulations, and Executive Orders found in 7 CFR part 1794, and any successor regulation;

(9) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. 4601 et seq., and with implementing Federal regulations in 49 CFR part 24 and 7 CFR part 21;

(10) The regulations implementing E.O. 12549, Debarment and Suspension, 2 CFR parts 180 and 417 ;

(11) The requirements regarding Lobbying for Contracts, Grants, Loans, and Cooperative Agreements in 31 U.S.C. 1352;

(12) Certification regarding Flood Hazard Area Precautions;



(13) Certification regarding Debarment, Suspension, and Other Responsibility Matters – Primary Covered Transactions; and

(14) Certification that the borrower is not delinquent on any Federal debt and has been informed of the collection options the Federal Government may use to collect delinquent debt.

(b) Applicants must agree in writing to comply with all Federal, State and local laws, rules, regulations, ordinances, codes, and orders applicable to the project.

**§§1738.157 – 1739.200 [Reserved]**

## **Subpart E - Application Review and Underwriting**

### **§ 1738.201 Application submission.**

(a) Loan applications must be submitted directly to the Agency's National Office. All applications must contain two hard copies and an electronic copy of the entire application. An application is considered received upon receipt of the hard and electronic copies by the National Office.

(b) The Agency is developing an online application system. Once the system becomes available, all applicants will be required to submit applications through the online system.

(c) The Agency may publish additional application submission requirements in the Federal Register.

### **§ 1738.202 Elements of a complete application.**

Applications must be submitted in the format required by the Rural Broadband Access Loan and Loan Guarantee Program Application Guide (the Application Guide),

available on the agency's website, so that applications can be uniformly evaluated and compared. To be considered complete, an application must contain at least the following items, in form and substance acceptable to the Agency:

- (a) A completed RUS Form 532, including any additional items required by the form;

- (b) Information required for the public notice to determine service area eligibility (see § 1738.204);

- (c) Documentation demonstrating how the applicant will meet the equity requirement of § 1738.207;

- (d) A market survey, unless not required by § 1738.209(b);

- (e) A competitive analysis of the entire proposed service territory(ies) (see § 1738.210);

- (f) The historical and projected financial information required in § 1738.211;

- (g) A network design, which also demonstrates the ability to provide service at the broadband lending speed (see § 1738.212);

- (h) A legal opinion that addresses the applicant's ability to enter into a loan as requested in the loan application, to pledge security as required by the Agency, to describe all pending litigation matters, and such other requirements as are detailed in the Application Guide;

- (i) Documentation proving that all required licenses and regulatory approvals for the proposed operation have been obtained, or the status of obtaining such licenses or approvals; and

(j) Additional items that may be required by the Administrator through a notice in the Federal Register.

**§ 1738.203 Priority for approving loan applications.**

(a) The Agency will compare and evaluate all applications that have been submitted for funding and deemed to be complete no less than twice a year, and shall give priority to applications in the following order (Note that for applications containing multiple proposed funded service areas, the percentage will be calculated combining all proposed funded service areas.):

(1) Applications in which no broadband service, as defined herein is available in the proposed funded service area;

(2) Applications in which at least 75 percent of households in the proposed funded service area have no broadband service;

(3) Applications in which at least 50 percent of households in the proposed funded service area have no broadband service;

(4) Applications in which at least 25 percent of households in the proposed funded service area have no broadband service; and

(5) Applications in which at least 25 percent of the customers in the proposed service area are commercial interests and predominately more households are proposed to be served than businesses.

(b) Once applications have been determined to be complete, they will be compared and prioritized according to the criteria listed in paragraph (a) above, and subject to available funding levels.

(c) If two or more applications are tied for a place in the processing queue, the application that promotes broadband adoption will be given priority over applications that do not promote broadband adoption.

(d) The Agency shall establish the National and State reserve levels in accordance with Title VI of the RE Act when feasible given the level of funds available for the program. In instances when funds in a particular area are insufficient to cover a loan request, priority will be given to applications for which funding is available.

**§ 1738.204 Public notice.**

(a) The Agency will publish a public notice of each application. The application must provide a summary of the information required for such public notice including all of the following information:

- (1) The identity of the applicant;
- (2) A map of each service area showing the rural area boundaries and the unserved areas using the Agency's Mapping Tool;
- (3) The amount and type of support requested;
- (4) The status of the review of the application;
- (5) The estimated number of unserved households in each service area exclusive of satellite broadband service;
- (6) A description of all the types of services that the applicant proposes to offer in each service area; and
- (7) A list of the census block groups proposed to be served.

(b) The Agency will publish the public notice on an Agency webpage after the application has been received in the Agency's National Office and will remain on the

webpage for a period of 30 calendar days. The notice will ask existing service providers to submit to the Agency, within this notice period, the following information:

(1) The number of residential and business customers within the applicant's service area that are currently offered broadband service by the existing service provider;

(2) The number of residential and business customers within the applicant's service area currently purchasing the existing service provider's broadband service, the rates of data transmission being offered, and the cost of each level of broadband service charged by the existing service provider;

(3) The number of residential and business customers within the applicant's service area receiving the existing service provider's non-broadband services and the associated rates for these other services;

(4) A map showing where the existing service provider's services coincide with the applicant's service area using the Agency's Mapping Tool; and

(5) Whether the existing service provider is an existing RUS borrower or grantee.

(c) The Agency will use the information submitted to determine if the existing service provider will be classified as an incumbent service provider. Notwithstanding non-responses by existing providers, the Agency will use all information available to it in evaluating the feasibility of the loan.

(d) The Agency will determine whether the service areas included in the application are eligible for funding based on all available information. If part or parts of the applicant's proposed funded service area are ineligible, the Agency will contact the applicant and require that those ineligible areas be removed from the proposed funded service area or that other funding be provided. If the ineligible service areas are not

removed from the funding request or additional funds are not provided, the Agency will reject the application. Given that applications may need to be revised to reflect modified service areas, applicants are encouraged to re-submit their applications as soon as possible to avoid that their applications will not be considered for the current evaluation period.

(e) The information submitted by an existing service provider will be treated as proprietary and confidential to the extent permitted under applicable law.

(f) If an application is approved, an additional notice will be published on the agency's website that will include the following information:

- (1) The name of the entity receiving the financial assistance;
  - (2) The type of assistance being received; and
  - (3) The purpose of the assistance;
- (g) The semiannual reports submitted under § 1738.254(e).

#### **§ 1738.205 Notification of completeness.**

If all proposed funded service areas are eligible, the Agency will review the application for completeness. The completeness review will include an assessment of whether all required documents and information have been submitted and whether the information provided is of adequate quality to allow further analysis.

(a) If the application contains all documents and information required by this part and is sufficient, in form and substance acceptable to the Agency, the Agency will notify the applicant, in writing, that the application is complete. A notification of completeness is not a commitment that the loan will be approved. By submitting an application, the

applicant acknowledges that no obligation to enter into a loan exists until actual loan documents have been executed.

(b) If the application is considered to be incomplete or inadequate, the Agency will notify the applicant, in writing, that the application has been rejected. The rejection letter will include an explanation of the reasons for rejection.

#### **§ 1738.206 Evaluation for feasibility.**

After an applicant is notified that the application is complete, the Agency will evaluate the application's financial and technical feasibility. Only applications that, as determined by the Agency, are technically and financially feasible will be considered for funding.

(a) The Agency will determine financial feasibility by evaluating the impact of the facilities financed with the proceeds of the loan and the associated debt, the applicant's equity, market survey (if required), competitive analysis, financial information, and other relevant information in the application.

(b) The Agency will determine technical feasibility by evaluating the applicant's network design and other relevant information in the application.

#### **§ 1738.207 Equity requirement.**

(a) To be eligible for a loan, an applicant must demonstrate a minimum equity contribution equal to 10 percent of the requested loan amount at the time of application which must remain available at loan closing. In addition to the 10 percent minimum equity requirement, § 1738.208 provides additional cash requirements that may be required in support of the loan.

(b) If the applicant does not have the required equity at the time the application is submitted, the applicant may satisfy the equity requirement at the time of application with an investor's unconditional legal commitment to cover the shortfall by providing additional equity. The additional equity must be transferred to the applicant prior to loan closing. If this option is elected, the applicant must provide evidence in the application that clearly identifies the investor's commitment to the applicant; the amount, terms, and conditions of the investment; and the investor's bank or financial statements that demonstrate its ability to fulfill its commitment. The terms and conditions of the investment must be acceptable to the Agency, but at a minimum cannot be secured by any assets of the applicant nor provide that the investment will be available when certain requirements or other thresholds are met by the applicant. The Agency will reject applications that do not provide evidence acceptable to the Agency regarding the investor's commitment.

(c) For State and local government applicants, the equity requirement can be satisfied with a general obligation bond, as long as the additional equity will be available to the applicant at closing. If the equity requirement is satisfied with a general obligation bond, the broadband loan cannot be subordinate to the bond. The applicant must submit an opinion from its legal counsel that the applicant has the authority to issue a general obligation bond in an amount sufficient to meet the minimum equity requirement. Revenue bonds supported by the operations to be funded cannot be used to satisfy the equity requirement.

**§ 1738.208 Additional cash requirements.**



(a) If the Agency's financial analysis indicates that the applicant's entire operation (existing operations and new operations combined) will show an inadequate cash balance at the end of any year during the five-year forecast period, the Agency will require the applicant to obtain additional cash infusions necessary to maintain an appropriate cash balance throughout the five-year forecast period. This cash infusion would be in conjunction with the required 10 percent minimum equity position.

(1) The Agency will require the applicant and its investors to:

(i) Infuse additional cash to cover projected deficits for the first two years of operations at loan closing; and

(ii) Enter into legal arrangements that commit them to making additional cash infusions to ensure that the operation will sustain a positive cash position on a quarterly basis throughout the five-year forecast period.

(2) For purposes of identifying the additional cash requirement for a start-up operation or an operation that has not demonstrated positive cash flow for the two years prior to the submission date of the application, 50 percent of projected revenues for each year of the five-year forecast period will be considered to determine if an operation can sustain a positive cash position. In addition to the initial financial projections required to demonstrate financial feasibility, such applicants must complete adjusted financial projections using the reduced revenue projections in order to identify the amount of additional cash that will be required. Projections must be fully supported with assumptions acceptable to the Agency. The applicant may present evidence in its loan application that projected revenues or a portion of projected revenues are based on

binding commitments and request that more than 50 percent of the projected revenues be considered for the purpose of identifying the additional cash requirement.

(3) For purposes of satisfying the additional cash requirements for an existing operation that has demonstrated a positive cash flow for the two fiscal years prior to the submission date of the application, 100 percent of the projected revenues for each year of the five-year forecast period will be used to determine if an operation can sustain a positive cash position, as long as these projections are fully supported with assumptions acceptable to the Agency.

(4) If debt is incurred to satisfy the additional cash requirement, this debt must take a subordinate lien position to the Agency debt and must be at terms acceptable to the Agency.

(b) An applicant may satisfy the additional cash requirement with an unconditional, irrevocable letter of credit (LOC) satisfactory to the Agency. The LOC must be issued from a financial institution acceptable to the Agency and must remain in effect throughout the forecast period. The applicant and the Agency must both be payees under the LOC. The LOC must have payment conditions acceptable to the Agency, and it must be in place prior to loan closing. The applicant cannot secure the LOC with its assets and cannot pay for any LOC charges or fees with its funds.

(c) If the Agency offers a loan to the applicant, the applicant must ensure that the additional cash infusion required in the first two years is deposited into its bank account within 120 days from the date the applicant signs the loan offer letter (see § 1738.251) and must enter into any other legal arrangements necessary to cover further projected operating deficits (or in the case of the LOC, to provide an acceptable LOC to the

Agency) prior to closing. If these requirements are not completed within this timeframe, the loan offer will be terminated, unless the applicant requests and the Agency approves an extension based on extenuating circumstances that the Agency was not aware of at the time the offer was made.

**§ 1738.209 Market survey.**

(a) Except as provided in paragraph (b) of this section, the applicant must complete a separate market survey for each service area where the applicant proposes to provide service at the broadband lending speed. Each market survey must demonstrate the need for the service at the broadband lending speed, support the projected penetration rates and price points for the services to be offered, and support the feasibility analysis. The market survey must also address all other services that will be provided in connection with the broadband loan. Additional information on the requirements of the market survey can be found in the Application Guide.

(b) The applicant is not required to complete a market survey for any service offering for which the applicant is projecting less than a 20 percent penetration rate in each service area by the end of the five-year forecast period. For example, if the applicant is projecting a penetration rate of 30 percent for data services and 15 percent for video services, a market survey must be completed for the data services. The proposed prices for those services with a projected penetration rate less than 20 percent must be affordable, as determined by the Agency.

(c) For a market survey to be acceptable to the Agency, it must have been completed within six months of the application submission date. The Agency may reject

any application in which the financial projections are not supported by the market survey. If the demographics of the proposed service area have significantly changed since the survey was completed, the Agency may require an updated market survey.

**§ 1738.210 Competitive analysis.**

The applicant must submit a competitive market analysis for each service area regardless of projected penetration rates. Each analysis must identify all existing service providers and all resellers in each service area regardless of the provider's market share, for each type of service the applicant proposes to provide. This analysis must include each competitor's rate packages for all services offered, the area that is being covered, and to the extent possible, the quality of service being provided.

**§ 1738.211 Financial information.**

(a) The applicant must submit financial information acceptable to the Agency that demonstrates that the applicant has the financial capacity to fulfill the loan requirements and to successfully complete the proposed project.

(1) If the applicant is an existing company, it must provide complete copies of audited financial statements (opinion letter, balance sheet, income statement, statement of changes in financial position, and notes to the financial statement) for the three fiscal years preceding the application submission. If audited statements are not available, the applicant must submit unaudited financial statements and tax returns for those fiscal years. Applications from start-up entities must, at a minimum, provide an opening balance sheet dated within 30 days of the final submission of all application material.

(2) If the applicant is a subsidiary operation, it must also provide complete copies of audited financial statements for the parent operation for the fiscal year preceding the application submission. If audited statements are not available, unaudited financial statements and tax returns for the previous year must be submitted.

(3) If the applicant relies on services provided by an affiliated operation, it must also provide complete copies of audited financial statements for any affiliate for the fiscal year preceding the application submission. If audited statements are not available, unaudited statements and tax returns for the previous year must be submitted.

(4) Applicants must provide a list of all its outstanding obligations. Copies of existing notes and loan and security agreements must be included in the application.

(5) Applicants must provide a detailed description of working capital requirements and the source of these funds.

(b) Applicants must submit the following documents that demonstrate the proposed project's financial viability and ability to repay the requested loan.

(1) Customer projections for the five-year forecast period that substantiate the projected revenues for each service that is to be provided. The projections must be provided on at least an annual basis and must be developed separately for each service area. These projections must be clearly supported by the information contained in the market survey, unless no market survey is required (see § 1738.209(b)).

(2) Annual financial projections in the form of balance sheets, income statements, and cash flow statements for the five-year forecast period. Prior to the submission of an application, an applicant may request that alternative information related to financial viability be considered when the applicant can for good cause demonstrate why a full five

year forecast cannot be provided. If this request is approved by the Agency, then the applicant can submit the application using the alternative information that was approved.

(i) These projections must use a system of accounts acceptable to the Agency and be supported by a detailed narrative that fully explains the methodology and assumptions used to develop the projections.

(ii) The financial projections submitted by the applicant must demonstrate that their entire operation will be able to meet a minimum TIER requirement equal to 1.25 by the end of the five-year forecast period. Demonstrating that the operation can achieve a projected TIER of 1.25 does not ensure that the Agency will approve the loan.

(iii) If the financial analysis suggests that the operation will not be able to achieve the required TIER ratio, the Agency will not approve the loan without additional capital, additional cash, additional security, and/or a change in the loan terms.

(c) Based on the financial evaluation, the loan documents will specify TIER requirements that must be met throughout the amortization period.

#### **§ 1738.212 Network design.**

(a) Applications must include a network design that demonstrates the project's technical feasibility. The network design must fully support the delivery of service at the broadband lending speed, together with any other services to be provided. In measuring speed, the Agency will take into account industry and regulatory standards. The design must demonstrate that the project will be complete within three years from the day the Agency notifies the applicant that loan funds are available and must include the following items:

(1) A detailed description of the proposed technology that will be used to provide service at the broadband lending speed. This description must clearly demonstrate that all households in the proposed funded service area will be offered service at the broadband lending speed;

(2) A detailed description of the existing network. This description should provide a synopsis of the current network infrastructure;

(3) A detailed description of the proposed network. This description should provide a synopsis of the proposed network infrastructure;

(4) A description of the approach and methodology for monitoring ongoing service delivery and service quality for the services being deployed;

(5) Estimated project costs detailing all facilities that are required to complete the project. These estimated costs must be broken down to indicate costs associated with each proposed service area and must specify how Agency and non-Agency funds will be used to complete the project;

(6) A construction build-out schedule of the proposed facilities by service area on a quarterly basis. The build-out schedule must include:

(i) A description of the work force that will be required to complete the proposed construction;

(ii) A timeline demonstrating project completion within three years and four months from the date of the loan contract;

(iii) Detailed information showing that all households within the proposed funded service area will be offered service at the broadband lending speed when the system is complete; and

(iv) Detailed information showing that construction of the proposed facilities will start within six months from the date the Agency notifies the borrower that loan funds are available.

(7) A depreciation schedule for all facilities financed with loan and non-loan funds;

(8) An environmental report prepared in accordance with 7 CFR part 1794 or successor environmental policies and procedures; and

(9) Any other system requirements required by the Administrator through a notice published in the Federal Register.

(b) The network design must be prepared by a registered Professional Engineer with telecommunications experience or by qualified personnel on the applicant's staff. If the network design is prepared by the applicant's staff, the application must clearly demonstrate the staff's qualifications, experience, and ability to complete the network design. To be considered qualified, staff must have at least three years of experience in designing the type of broadband system proposed in the application.

#### **§ 1738.213 Loan determination.**

(a) If the application meets all statutory and regulatory requirements and the feasibility study demonstrates that the TIER requirement can be satisfied and the business plan is sustainable, the application will be submitted to the Agency's credit committees for consideration according to the priorities in § 1738.203. Such submission of an application to the Agency's credit committees does not guarantee that a loan will be



approved. In making a loan determination, the Administrator shall consider the recommendations of the credit committees.

(b) The applicant will be notified of the Agency's decision in writing. If the Agency does not approve the loan, a rejection letter will be sent to the applicant, and the application will be returned with an explanation of the reasons for the rejection.

**§§ 1738.214 – 1738.250 [Reserved]**

**Subpart F - Closing, Servicing, and Reporting**

**§ 1738.251 Loan offer and loan closing.**

The Agency will notify the applicant of the loan offer, in writing, and the date by which the applicant must accept the offer. If the applicant accepts the terms of the loan offer, a loan contract executed by the Agency will be sent to the applicant. The applicant must execute the loan contract and satisfy all conditions precedent to loan closing within the timeframe specified by the Agency. If the conditions are not met within this timeframe, the loan offer will be terminated, unless the applicant requests, and the Agency approves, an extension. The Agency may approve such a request if the applicant has diligently sought to meet the conditions required for loan closing and has been unable to do so for reasons outside its control.

**§ 1738.252 Construction.**

(a) Construction paid for with broadband loan funds must comply with 7 CFR part 1788, 7 CFR part 1794, RUS Bulletin 1738-2, and any successor regulations found on the agency's website, and any other guidance from the Agency.

(b) Once the Agency has extended a loan offer, the applicant, at its own risk, may start construction that is included in the loan application on an interim financing basis. For this construction to be eligible for reimbursement with loan funds, all construction procedures contained in this part must be followed. Note, however, that the Agency's extension of a loan offer is not a guarantee that a loan will be made, unless and until a loan contract has been entered into between the applicant and RUS.

(c) The build-out must be complete within three years and 4 months from the date of the loan contract. Build-out is considered complete when the network design has been fully implemented, the service operations and management systems infrastructure is operational, and the borrower is ready to support the activation and commissioning of individual customers to the new system.

#### **§ 1738.253 Servicing.**

(a) Borrowers must make payments on the broadband loan as required in the note.

(b) Borrowers must comply with all terms, conditions, affirmative covenants, and negative covenants contained in the loan documents.

(c) In the event of default of any required payment or other term or condition:

(1) A late charge shall be charged on any payment not made in accordance with the terms of the note.

(2) The Agency may exercise the default remedies provided in the loan documents and any remedy permitted by law, but is not required to do so.

(3) If the Agency chooses to not exercise its default remedies, it does not waive its right to do so in the future.

#### **§ 1738.254 Accounting, reporting, and monitoring requirements.**

(a) Borrowers must adopt a system of accounts for maintaining financial records acceptable to the Agency, as described in 7 CFR part 1770, subpart B.

(b) Borrowers must submit annual audited financial statements along with a report on compliance and on internal control over financial reporting, and management letter in accordance with the requirements of 7 CFR part 1773. The Certified Public Accountant (CPA) conducting the annual audit is selected by the borrower and must be approved by RUS as set forth in 7 CFR 1773.4.

(c) Borrowers must comply with all reasonable Agency requests to support ongoing monitoring efforts. The Borrower shall afford RUS, through its representatives, reasonable opportunity, at all times during business hours and upon prior notice, to have access to and the right to inspect the Broadband System, and any other property encumbered by the Mortgage, and any or all books, records, accounts, invoices, contracts, leases, payrolls, timesheets, cancelled checks, statements, and other documents, electronic or paper of every kind belonging to or in the possession of the Borrower or in any way pertaining to its property or business, including its subsidiaries, if any, and to make copies or extracts therefore.

(d) Borrower records shall be retained and preserved in accordance with the provisions of 7 CFR part 1770, subpart A.

(e) Borrowers must submit semiannual reports for 3 years after completion of the project. The reports must include the following information:

(1) The purpose of the financing, including new equipment and capacity enhancements that support high-speed broadband access for educational institutions, health care providers, and public safety service providers (including the estimated

number of end users who are currently using or forecasted to use the new or upgraded infrastructure);

(2) The progress towards fulfilling the objectives for which the assistance was granted, including:

(i) The number and location of residences and businesses that will receive service at or greater than the broadband lending speed;

(ii) The types of facilities constructed and installed;

(iii) The speed of the broadband services being delivered;

(iv) The average price of the broadband services being delivered in each proposed service area;

(v) The broadband adoption rate for each proposed service territory, including the number of new subscribers generated from the facilities funded; and

(3) Any other reporting requirements established by the Administrator by notice in the Federal Register.

#### **§ 1738.255 Default and de-obligation.**

If a default under the loan documents occurs and such default has not been cured within the timeframes established in the loan documents, the Applicant acknowledges that the Agency may, depending on the seriousness of the default, take any of the following actions:

(a) To the greatest extent possible recover the maximum amount of loan funds.

(b) De-obligate all funds that have not been advanced; and

(c) Reallocate recovered funds to the extent possible as prescribed by the Office of Management and Budget.

**§§ 1738.256 – 1738.300 [Reserved]**

**Subpart G - Loan Guarantee**

**§ 1738.301 General.**

(a) Applicants wishing to obtain a loan guarantee for private financing are subject to the same requirements as direct loan borrowers with respect to:

- (1) Loan purposes as described in subpart B of this part;
- (2) Eligible borrowers and eligible areas as described in subpart C of this part;
- (3) The loan terms described in subpart D of this part, with the exception of the interest rates described in § 1738.152;
- (4) The application review and underwriting requirements in subpart E of this part; and
- (5) The accounting, reporting, and monitoring requirements of subpart F of this part.

(b) The Agency will publish a notice in the Federal Register indicating any additional requirements, as well as the amount of funds available, if any, for loan guarantees.

**§ 1738.302 Eligible guaranteed lenders.**

To be eligible for a loan guarantee, a guaranteed lender must be:

(a) A financial institution in good standing that has been a concurrent lender with RUS; or

(b) A legally organized lending institution, such as commercial bank, trust company, mortgage banking firm, insurance company, or any other institutional investor authorized by law to loan money, which must be subject to credit examination and supervision by a Federal or State agency, unless the Agency determines that alternative examination and supervisory mechanisms are adequate.

**§ 1738.303 Requirements for the loan guarantee.**

At the time of application, applicants must provide in form and substance acceptable to the Agency:

(a) Evidence of the guaranteed lender's eligibility under § 1738.302;

(b) Evidence that the guaranteed lender has the demonstrated capacity to adequately service the guaranteed loan;

(c) Evidence that the guaranteed lender is in good standing with its licensing authority and meets the loan making, loan servicing, and other requirements of the jurisdiction in which the lender makes loans;

(d) Evidence satisfactory to the Agency of its qualification under this part, along with the name of the authority that supervises it;

(e) A commitment letter from the guaranteed lender that will be providing the funding, and the terms of such funding, all of which may be conditioned on final approval of the broadband loan guarantee by the Agency; and

(f) A description of any and all charges and fees for the loan, along with documentation that they are comparable to those normally charged other applicants for

the same type of loan in the ordinary course of business. Such charges and fees will not be included within the Agency's loan guarantee.

**§ 1738.304 Terms for guarantee.**

Loan guarantees will only be given on the conditions that:

(a) The loan guarantee is no more than 80 percent of the principal amount, which shall exclude any and all charges and fees;

(b) The guarantee is limited to the outstanding loan repayment obligation of the borrower and does not extend to guaranteeing that the guaranteed lender will remit to a holder, loan payments made by the borrower;

(c) The interest rate must be fixed and must be the same or lesser for the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed amount equivalent, as the case may be, and unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be;

(d) The entire loan will be secured by the same security with equal lien priority for the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be, and unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be;

(e) The unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be, will neither be paid first nor given any preference or priority over the guaranteed loan amount

or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be;

(f) Prior written approval is obtained from the Agency for any assignment by the guaranteed lender. Any assignment shall entitle the holder to all of the guaranteed lender's rights but shall maintain the guaranteed lender responsible for servicing the entire loan;

(g) The borrower, its principal officers, members of the borrower's board of directors and members of the immediate families of said officials shall not be a holder of the guaranteed lender's loan;

(h) The Agency will not guarantee any loan under this subpart that provides for a balloon payment of principal or interest at the final maturity date of the loan or for the payment of interest on interest;

(i) All loan guarantee documents between the Agency and the guaranteed lender are prepared by the Agency; and

(j) The loan agreement between the borrower and the lender shall be subject to Agency approval.

#### **§ 1738.305 Obligations of guaranteed lender.**

Once a loan guarantee has been approved, the guaranteed lender will be responsible for:

(a) Servicing the loan;

(b) Determining that all prerequisites to each advance of loan funds by the lender under the terms of the contract of guarantee, all financing documents, and all related security documents have been fulfilled;



- (c) Obtaining approval from the Agency to advance funds prior to each advance;
- (d) Billing and collecting loan payments from the borrower;
- (e) Notifying the Administrator promptly of any default in the payment of principal and interest on the loan and submit a report no later than 30 days thereafter, setting forth the reasons for the default, how long it expects the borrower will be in default, and what corrective actions the borrower states that it is taking to achieve a current debt service position; and
- (f) Notifying the Administrator of any known violations or defaults by the borrower under the lending agreement, contract of guarantee, or related security instruments or conditions of which the lender is aware which might lead to nonpayment, violation, or other default.

**§ 1738.306 Agency rights and remedies.**

- (a) The guarantee must provide that upon notice to the lender, the Agency may assume loan servicing responsibilities for the loan or the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be, or require the lender to assign such responsibilities to a different entity, if the lender fails to perform its loan servicing responsibilities under the loan guarantee agreement, or if the lender becomes insolvent, makes an admission in writing of its inability to pay its debts generally as they become due, or becomes the subject of proceedings commenced under the Bankruptcy Reform Act of 1978, as amended (11 U.S.C. 101 et seq.) or any similar applicable Federal or State law, or is no longer in good standing with its licensing authority, or ceases to meet the eligibility requirements of this subpart. Such negligent servicing is defined as the failure to perform

those services which a reasonable prudent lender would perform in servicing its own portfolio of loans that are not guaranteed and includes not only a failure to act but also not acting in a timely manner.

(b) The guarantee shall cease to be effective with respect to any guaranteed loan amount or any guaranteed loan portion amount or any guaranteed-amount equivalent to the extent that:

(1) The guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed amount equivalent, as the case may be, is separated at any time from the unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be, in any way.; or

(2) Any holder of the guaranteed loan note or any guaranteed loan portion note, as the case may be, having a claim to payments on the guaranteed loan receives more than its pro-rata percentage of any payment due to such holder from payments made under the guarantee at any time during the term of the guaranteed loan.

#### **§ 1738.307 Additional policies.**

The Agency shall provide additional loan guarantee policies, consistent with OMB Circular A-129, in order to achieve its mission of promoting broadband in rural areas, which shall be published, as needed, in the Federal Register.

#### **§ 1738.308 Full faith and credit of the United States.**

Loan guarantees made under this part are supported by the full faith and credit of the United States and are incontestable except for fraud or misrepresentation of which the holder had actual knowledge at the time it became a holder.

**§§ 1738.309 – 1738.349 [Reserved]**

**§ 1738.350 OMB control number.**

The information collection requirements in this part are approved by the Office of Management and Budget (OMB) and assigned OMB control number 0572-0130.

**Dated: July 8, 2015.**

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Brandon McBride

Administrator

Rural Utilities Service

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